

Before the
COPYRIGHT ROYALTY TRIBUNAL
Washington, D.C.

ORIGINAL

In the Matter of)
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)
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1983 Cable Royalty)
Distribution Proceeding)
)
)
)

Docket No. CRT 84-1-83CD

NAB'S OBJECTIONS AND CONTINGENT OBJECTIONS
TO CERTAIN DIRECT CASE
EVIDENCE OF OTHER PHASE I CLAIMANTS

The National Association of Broadcasters (NAB), on behalf of United States commercial radio and television station claimants, hereby objects to and moves to strike the portions of the direct cases of other Phase I claimants listed and discussed below. The first section of this motion sets forth NAB's objections to certain evidence on the grounds of relevance, materiality, competence and hearsay. The second section sets forth contingent objections to evidence as to which NAB has requested underlying documentation. The relevant parties have agreed to make this documentation available by June 3. If the requested information is made available, NAB will withdraw these contingent objections.

I. OBJECTIONS

A. PBS

(1) NAB objects to and moves to strike those portions of PBS's direct case specifically labelled "statements of counsel."

Statements made by a party's attorney during a trial or hearing are not evidence, unless the attorney is called as a witness to testify on a subject about which he has personal knowledge. See Wright & Graham, Federal Practice and Procedure: Evidence § 5163 (1978), and cases cited therein. This principle avoids having an attorney present information to the finder of fact that is not subject to the rigors of cross-examination.

NAB assumes that counsel for PBS will not take the stand and be cross-examined on the statements he has made in PBS's direct case. NAB therefore objects to and moves to strike the following material:

**Direct Case of Public
Television:**

¶¶ 1-7, 26 and 39

(2) The Statement of John P. Madigan, Jr., simply describes why his corporation has decided to underwrite programs on public television, and has no bearing whatsoever on any of the issues before the Tribunal in this hearing. The personal opinions of program sponsors as to the desirability of a program as a matter of social policy are irrelevant. The following portion of PBS's direct case should be stricken:

**Statement of John P. Madigan,
Jr., PTV Exhibit 18:**

Entire exhibit

**Direct Case of Public
Television:**

Paragraph 17, all but
first sentence

(3) NAB objects to and moves to strike the McHugh and Hoffman study (with one minor exception) and the Barthman study, and

those portions of PBS's direct case which refer to or rely on any part of these studies. The McHugh and Hoffman study, conducted in February-April, 1985, surveyed a sample of cable operators about their views toward public television signals. The survey questionnaire reveals, however, that the respondents were not asked to narrow their answers to the year 1983; rather, they were questioned only about their current attitudes toward PBS programming. The sole exception is Question 10b, which makes a specific reference to 1983. The Barthman study, similarly, collected data and drew conclusions which have no direct probative value in this hearing, since it was undertaken in 1984, not 1983.

Because these studies are not concerned with the basis for this proceeding, the value of distant signal programming in 1983, they are immaterial. See Payne of Virginia, Inc., 66 F.C.C.2d 633, 638-39 (1977); cf. United States v. Gordon, 634 F.2d 639, 644 (1st Cir. 1980). NAB therefore objects to and moves to strike as irrelevant the following portions of PBS's direct case:

Statement of Peter S. Hoffman, Pages 3-10
PTV Exhibit 29:

Statement of James A. Barthman, ¶¶ 3, 5 and 6
PTV Exhibit 32: Tabulation of Survey
Responses
Comments Relating to PBS

Carriage of Public Television
by Cable Systems,
PTV Exhibit 30: Entire exhibit, includ-
ing appendices and
tables, except for data
relating to Survey
Question 10b

Direct Case of Public
Television: ¶ 40

PTV Exhibit 33: Entire exhibit

Direct Case of Public
Television:

¶ 42

B. Music

(1) The newspaper articles and trade publications presented as exhibits by the Music Claimants are inadmissible hearsay and should be stricken from the record.

Under the Federal Rules of Evidence, hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801. Newspaper and magazine articles "are routinely held inadmissible as hearsay. [Citations omitted]. We know nothing about the preparation of these articles -- the author, his sources, his knowledge, etc." Zenith Radio Corp. v. Matsushita Electric Industrial Co., 513 F.Supp. 1100, 1232 n.198 (E.D. Pa. 1981), modified on other grounds, 723 F.2d 238 (3d Cir. 1983). See also Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539, 556-57 (5th Cir. 1980), cert. denied, 454 U.S. 927 (1981); Ray v. Edwards, 557 F. Supp 664, 673-74 (N.D. Ga. 1982) modified on other grounds, 725 F.2d 665 (11th Cir. 1984); De la Cruz v. Dufresne, 533 F. Supp 145, 149 (D. Nev. 1982).

It appears that the following exhibits were introduced for the truth of the matters asserted therein; this being so, they cannot be accepted without being sponsored by their respective authors. Accordingly, these exhibits, and all portions of

Mr. Biederman's testimony which refer to them, are inadmissible hearsay and must be stricken:

Exhibit 16
Exhibit 19
Exhibit 20
Exhibit 21
Exhibit 22
Exhibit 23
Exhibit 24
Exhibit 26
Exhibit 27
Exhibit 28
Exhibit 29
Exhibit 30
Exhibit 31
Exhibit 32
Exhibit 33
Exhibit 34
Exhibit 36
Exhibit 37
Exhibit 38
Exhibit 39

(2) Most of the Music Claimants' newspaper and trade magazine article exhibits, besides being inadmissible hearsay, are also irrelevant, because they relate to times or subject matters that do not bear on the Tribunal's 1983 Distribution Proceeding deliberations.

a. The purpose of this proceeding is to allocate the royalty fund to the holders of copyrights in programming that is transmitted on a distant signal basis. Yet the Music Claimants have offered testimony and exhibits relating to music videos carried on MTV, BET, TNN and other pay cable services, none of which is a distant signal and none of which qualifies for a share of the royalty fund. The testimony and exhibits are irrelevant to the issue of the value of music videos on distant signals, and

they obfuscate the extent of music's contribution to programs which are compensable out of the royalty fund.

The testimony and exhibits listed below are irrelevant and must be stricken:

Testimony of Don Biederman:	p. 8, ¶ 2, lines 2-4
	p. 12, line 4, through
	p. 13, line 10
Exhibit 20	
Exhibit 21	
Exhibit 22	
Exhibit 23	
Exhibit 24	
Exhibit 30	
Exhibit 31, p. 1, p. 2 ¶¶ 1-4, p.3	
Exhibit 32	
Exhibit 33	

b. In addition, this proceeding concerns only programs transmitted in 1983. The impact of music videos on this proceeding must accordingly be measured by the events of 1983 alone; the effect and value of music videos in 1984 and 1985 is irrelevant. See Payne of Virginia, Inc., 66 F.C.C.2d 633, 638-39 (1977). Thus, the following testimony and exhibits of the Music Claimants, which concern the value and effects of music videos transmitted in 1984 and 1985, are irrelevant and must be stricken from the record:

Testimony of Don Biederman:	p. 8, ¶ 2, last two sentences
	p. 14, text under heading "Commercials"
	p. 15, ¶ 1, last sentence
	p. 15, ¶ 2, last sentence

Exhibit 24
Exhibit 26
Exhibit 27
Exhibit 28
Exhibit 34
Exhibit 36
Exhibit 37

C. National Public Radio

(1) NAB objects to and moves to strike the following testimony and exhibits regarding NPR's audience, on the basis that it has nothing to do with NPR's cable audience or cable carriage and is therefore irrelevant:

Testimony of Douglas J.
Bennet:

pp. 8-10 (starting with
"1983 and the NPR
Audience")

Exhibit PR-205

(2) NAB objects to and moves to strike the following exhibit, which includes only letters from NPR cable listeners written in 1984 and 1985, on the basis that it has nothing to do with NPR's cable listeners or cable carriage in 1983 and is therefore irrelevant:

Exhibit PR-206

II. CONTINGENT OBJECTIONS

The parties have agreed to provide each other with information underlying certain portions of their direct evidence, by June 3, 1985. NAB believes, and the parties have indicated, that this information will be forthcoming. In order to comply with the Tribunal's schedule, however, NAB here objects to evidence for which the requested underlying information has not yet been

provided. If the requested information is timely provided, NAB will withdraw these contingent objections.

The parties have requested additional information so that they and the Tribunal may fully analyze each others' cases and effectively examine each others' witnesses. The requested underlying information is "necessary for a full and true disclosure of the facts," 37 C.F.R. § 301.53(b) (1985), and for meaningful cross-examination, which is "beyond doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore on Evidence § 1367 (1974). Accordingly, if the information requested by NAB and the other parties is not provided, NAB objects to and moves to strike certain evidence of the other Phase I claimants, as described below:

A. MPAA

NAB has requested MPAA to provide the following information:

- (1) A listing of all syndicated series and movies provided in the same manner as Exhibit _____ (ARC-12);
- (2) All written instructions provided to Nielsen and Larson with regard to the Nielsen Special Report;
- (3) A list of all remaining discrepancies in program classification between Nielsen and Larson;
- (4) Any correspondence between MPAA and Nielsen regarding the Special Report;

- (5) The attachment identified in Exhibit _____
(ARC-2); and
- (6) A description of the methodology used to
determine the 3.75% stations shown in Exhibit
_____ (ARC-10).

NAB objects to and moves to strike the following portions of MPAA's direct case, all of which relate to the MPAA/Nielsen study, unless MPAA provides the underlying documentation NAB has requested:

Testimony of Jack Valenti:	page 3, paragraph 3 to end of first full paragraph on page 4
Testimony of Paul Lindstrom:	entire
Testimony of Donald R. Koehler:	entire
Testimony of Marsha E. Kessler:	entire
Testimony of Thomas E. Larson:	entire
Testimony of Allen R. Cooper:	page 1, second paragraph to end.

Exhibit _____	(DRK-1)
Exhibit _____	(MEK-1)
Exhibit _____	(MEK-2)
Exhibit _____	(TAL-1)
Exhibit _____	(TAL-2)
Exhibit _____	(TAL-3)
Exhibit _____	(ARC-1)
Exhibit _____	(ARC-2)
Exhibit _____	(ARC-3)
Exhibit _____	(ARC-4)
Exhibit _____	(ARC-5)
Exhibit _____	(ARC-6)
Exhibit _____	(ARC-7)
Exhibit _____	(ARC-8)
Exhibit _____	(ARC-9)
Exhibit _____	(ARC-10)

Exhibit _____ (ARC-11)
Exhibit _____ (ARC-12)

B. Joint Sports

NAB has requested that the Joint Sports Claimants (JSC) provide information on the dates and sources for the promotional material presented in their Exhibit 2. NAB has also requested a list of all 1983 sports flagship stations and their affiliated teams. This information underlies both of Dr. Lemieux's studies.

NAB objects to and moves to strike the following portions of JSC's direct case unless JSC provides the underlying documentation NAB has requested:

Testimony of Paul Bortz: page 8, first paragraph

Testimony of Peter Lemieux: second paragraph

Exhibit 2

Exhibit 3

Exhibit 4

C. PBS

NAB has requested that PBS provide the responses to the McHugh and Hoffman survey (PTV Exhibit 30). NAB has moved to strike this survey, and all testimony concerning it, on the ground that it is irrelevant, since, with one minor exception, it does not concern 1983. If, however, the Tribunal denies this objection, and if PBS fails to provide the requested underlying information, NAB moves to strike the following portions of PBS's direct case:

Statement of Peter S. Hoffman, Pages 3-10
PTV Exhibit 29:

Carriage of Public Television
by Cable Systems,
PTV Exhibit 30:

Entire exhibit, including
appendices and
tables, except for data
relating to Survey
Question 10b

Direct Case of Public
Television:

¶ 40

D. Canadian Claimants

(1) NAB has requested that the Canadian Claimants provide a list of all translator and repeater stations carrying Canadian signals, including their name, location and channel number and the Canadian signals they rebroadcast. This information is necessary to allow the parties and the Tribunal to determine the actual extent of distant carriage of Canadian signals, if any.

NAB objects to and moves to strike the following portions of the Canadian Claimants' direct case unless the Canadian Claimants provide the information NAB has requested:

Testimony of Trina McQueen: ¶ 11

Testimony of Robert Roy: ¶ 10

Testimony of Robin Fillingham: ¶ 10

Testimony of Michael B. Zimmer: ¶¶ 9-12

Testimony of Donald E. Lytle: ¶¶ 7-10

Exhibit CDN-AA
Exhibit CDN-BB
Exhibit CDN-CC
Exhibit CDN-DD
Exhibit CDN-EE
Exhibit CDN-FF
Exhibit CDN-GG

(2) NAB has requested that the Canadian Claimants provide a list of the 50 systems provided to Burke Marketing Research

(Burke) and how they were selected, a list of the 25 systems interviewed by Burke and how they were selected, and a list of the systems where an interview was not completed and why it was not completed.

NAB objects to and moves to strike the following portions of the Canadian Claimants' direct case unless they provide the information NAB has requested:

Testimony of Donald E. Lytle: ¶ 11
Testimony of Deidre K. Moulliet: ¶¶ 7-11
Exhibit CDN-S

Respectfully submitted,

NATIONAL ASSOCIATION OF
BROADCASTERS

By



Victor E. Ferrall, Jr.
John I. Stewart, Jr.

CROWELL & MORING
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-5800

Its Attorneys

Of Counsel:

Henry L. Baumann, Esq.
Michael D. Berg, Esq.
National Association of
Broadcasters
1771 N Street, N.W.
Washington, D.C. 20036

May 29, 1985

CERTIFICATE OF SERVICE

I, Lisa B. Hausman, hereby certify that on this 29th day of May, 1985, I caused to be served, by hand, a copy of the foregoing "NAB's Objections and Contingent Objections to Certain Direct Case Evidence of Other Phase I Claimants" to the following:

- * W. Thad Adams, III, Esq.
1401 City National Center
Charlotte, North Carolina 28202

- John H. Midlen, Jr., Esq.
1050 Wisconsin Avenue, N.W.
Washington, D.C. 20007

- Clifford Harrington, Esq.
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Washington, D.C. 20037

- Robert W. Coll, Esq.
McKenna, Wilkinson & Kittner
1150 17th Street, N.W.
Washington, D.C. 20036

- Philip R. Hochberg, Esq.
Baraff, Koerner, Olender & Hochberg
2033 M Street, N.W.
Suite 203
Washington, D.C. 20036

- Ritchie T. Thomas
Judy Jurin Semo, Esq.
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

- David H. Lloyd, Esq.
Robert Alan Garrett, Esq.
Arnold & Porter
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036

- Gene A. Bechtel, Esq.
Bechtel & Cole
2101 L Street, N.W.
Suite 502
Washington, D.C. 20036

* By Federal Express

- ** Jacqueline Weiss, Esq.
Public Broadcasting Service
475 L'Enfant Plaza, S.W.
Washington, D.C. 20024
- Jamie S. Gorelick, Esq.
David O. Stewart, Esq.
Miller, Cassidy, Larroca & Lewin
2555 M Street, N.W.
Suite 500
Washington, D.C. 20037
- ** Carol R. Whitehorn, Esq.
Senior Attorney
National Public Radio
2025 M Street, N.W.
Washington, D.C. 20036
- Charles T. Duncan, Esq.
Reid & Preist
Suite 1100
1111 19th Street, N.W.
Washington, D.C. 20036
- * I. Fred Koenigsberg, Esq.
Office of Bernard Korman, Esq.
ASCAP
One Lincoln Plaza
New York, N.Y. 10023
- * Nicholas Arcomano, Esq.
Vice President & Counsel
SESAC, Inc.
10 Columbus Circle
New York, N.Y. 10019
- Arnold P. Lutzker, Esq.
Carolyn A. Wimbly, Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Washington, D.C. 20037
- Arthur Scheiner, Esq.
Dennis Lane, Esq.
Wilner & Scheiner
1200 New Hampshire Avenue, N.W.
Suite 300
Washington, D.C. 20036
- ** Fritz E. Attaway
Motion Picture Association of America, Inc.
1600 I Street, N.W.
Washington, D.C. 20006


* By Federal Express

** By First Class Mail

Douglas G. Thompson, Jr., Esq.
Finkelstein, Thompson & Levenson
2828 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20007

** Donald E. Lytle
Director, Corporate Program Services
Canadian Broadcasting Corporation
P.O. Box 8478
Ottawa, Ontario K1G 3J5

** Sylvia Franklin, Esq.
Legal Counsel
Baton Broadcasting, Inc.
P.O. Box 9, Station "O"
Toronto, Ontario M41 2M9



Lisa B. Hausman

** By First Class Mail

CROWELL & MORING

1100 CONNECTICUT AVENUE, N. W.

WASHINGTON, D. C. 20036

(202) 452-5800

CABLE: CROMOR

TELECOPIER: 202-452-5970

W. U. I. (INTERNATIONAL) 64344

W. U. (DOMESTIC) 69-2448

May 29, 1985

The Honorable Edward R. Ray
Acting Chairman
Copyright Royalty Tribunal
1111 20th Street, N.W.
Washington, D.C. 20036

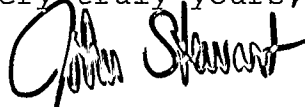
Re: Docket No. CRT 84-1-83CD

Dear Chairman Ray:

Transmitted herewith for filing, on behalf of the National Association of Broadcasters, are an original and four copies of its Objections and Contingent Objections to Certain Direct Case Evidence of Other Phase I Claimants in the 1983 Cable Royalty Distribution Proceeding.

If there are any questions regarding this matter, please communicate with this office.

Very truly yours,



John I. Stewart, Jr.

Enclosures

cc: Robert L. Cassler, Esq.
All Parties



1111 20th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 653-5175

84-1 83 CD
Objections to Direct Evidence - 5/29/85

Canadian Claimants

Joint Sports

Program Suppliers

Music Claimants

National Association of Broadcasters

National Public Radio

Devotional Claimants

PBS - Comments in Lieu of an Objection